

# Agenda Item Form

Agenda Date: 7/20/04

Districts Affected: ALL

Dept. Head/Contact Information: William A. Chapman 541-4011

## Type of Agenda Item:

- |   |  |  |
|---|--|--|
| <input type="checkbox"/> Resolution                       | <input type="checkbox"/> Staffing Table Changes              | <input type="checkbox"/> Board Appointments        |
| <input type="checkbox"/> Tax Instalment Agreements        | <input type="checkbox"/> Tax Refunds                         | <input type="checkbox"/> Donations                 |
| <input type="checkbox"/> RFP/ BID/ Best Value Procurement | <input type="checkbox"/> Budget Transfer                     | <input type="checkbox"/> Item Placed by Citizen    |
| <input type="checkbox"/> Application for Facility Use     | <input type="checkbox"/> Bldg. Permits/Inspection            | <input type="checkbox"/> Introduction of Ordinance |
| <input type="checkbox"/> Interlocal Agreements            | <input checked="" type="checkbox"/> Contract/Lease Agreement | <input type="checkbox"/> Grant Application         |
| <input type="checkbox"/> Other _____                      |  |  |

## Funding Source:

- ☐ General Fund
- ☐ Grant (duration of funds: \_\_\_\_\_ Months)
- ☒ Other Source: Hotel/Motel Tax

## Legal:

- ☒ Legal Review Required      Attorney Assigned (please scroll down): None      ☒ Approved      ☐ Denied

Timeline Priority: ☒ High      ☐ Medium      ☐ Low      # of days: \_\_\_\_\_

## Why is this item necessary:

To start programming for Plaza Theater

Explain Costs, including ongoing maintenance and operating expenditures, or Cost Savings:

No Additional Funding

Statutory or Citizen Concerns:

NONE

Departmental Concerns:

NONE

**RESOLUTION**

**BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

**THAT** the Mayor be authorized to sign a Fourth Amendment to the Facility Management and Tourism Agreement by and between the City of El Paso and SMG, a Pennsylvania general partnership, to manage the Plaza Theatre in accordance with this agreement.

**ADOPTED this 20<sup>th</sup> day of July 2004.**

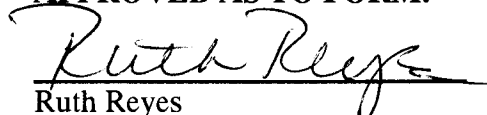
**CITY OF EL PASO**

**ATTEST:**

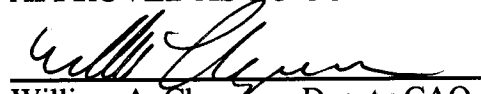
\_\_\_\_\_  
Joe Wardy, Mayor

\_\_\_\_\_  
Richarda D. Momsen, City Clerk

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Ruth Reyes  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

  
\_\_\_\_\_  
William A. Chapman, Deputy CAO  
of Financial Services

**THIS FOURTH AMENDMENT TO THE FACILITY MANAGEMENT AND TOURISM AGREEMENT (“Amendment”)** is made this 20<sup>th</sup> day of July, 2004 and effective as of the 1<sup>st</sup> day of September, 2004 (the “Commencement Date”) by and between **SMG**, a Philadelphia general partnership and successor in interest to LMI/HHI, Ltd. (“Manager”), and **THE CITY OF EL PASO, TEXAS**, a municipal corporation and home-rule city of the State of Texas principally in El Paso County (“Operator”).

This Fourth Amendment sets forth the agreed upon amendments and modifications to the Facility Management and Tourism Agreement dated March 12, 1998, by and between LMI/HHI Ltd., d/b/a Leisure Management International, and the City of El Paso, Texas (“Management Agreement”).

The Management Agreement is hereby amended as follows:

1. **“DEFINITIONS”** is hereby amended to add the following definitions:

Non-profit Organization is any organization that qualifies for non-profit status under the IRS and for purposes of this amendment is defined as supporting the mission of non-profits through the use of venues at a discounted rate in which the non-profit is at risk for the success or failure of the event and the proceeds from the event.

Days of Activity are defined as any day that a venue is contracted to a private party for a particular use. There is no time limit on the amount of time the private party uses the facility during that day. For purposes of this agreement it is possible that more than one private party could contract the same venue on the same day.

Opening of the Plaza Theatre is defined as the date set by manager within three months of Operator accepting the Plaza Theatre as substantially complete.

2. **“RECITALS”**, is hereby amended to add subsection “h” to read as follows:

“(h) Manager has agreed to accept the responsibility to manage the Plaza Theatre in accordance with the Terms of this Agreement.”

3. Section 2.3 (a) of the Management Agreement entitled “Term” and section 3 (a) of the June 18, 2002 Amendment is hereby amended and restated to read as follows:

- (a) “The initial term of this Agreement shall commence as of the Commencement Date and shall expire for any and all purposes, unless terminated earlier under the terms of this Agreement, at twelve o’clock midnight on September 1, 2010; and

4. The new Section 8.2 of the Management Agreement and section 11 of the June 18, 2002 Amendment, entitled “**Incentive Fees**,” shall be amended to read as follows:

**“Incentive Fees”**, Manager shall be entitled to an annual incentive fee for each Fiscal Year during the Term of the contract calculated as follows:

- (a). 40% of the Adjusted Base in the event that Revenues exceed the budgeted operating revenues in FY 2004-2005, and 35% of the Adjusted Base in the event that Revenues exceed the budgeted operating revenues FY 2005-2006 and thereafter, and
- (b). 20% of the Adjusted Base if expenses are less than Budgeted Operating Expenses, and
- (c). 10% of the Adjusted Base if the Hotel Occupancy Tax Revenue is greater than the previous Fiscal Year, and
- (e). 10% of the Adjusted Base if Manager demonstrates quality service to clients based on exit surveys, and
- (d). 20% of the Adjusted Base if the number of theatre patrons for ticketed events has increased from the previous fiscal year as evidenced by ticket manifests, turnstile counts and/or drop counts (valid until the Fiscal Year the Plaza Theatre opens), then
- (f). The following performance measures apply after the **Opening of the Plaza Theatre** and will be prorated during the first fiscal year of operation:
  - i. The following percentage of the Adjusted Base based on the number of Ticketed Patrons in the Abraham Chavez Theatre as evidenced by ticket manifests, turnstile counts and/or drop counts:

<u>Ticketed Patrons</u>	<u>Percentage</u>
0-15,000	0%
15,001-20,000	2%
20,001-25,000	4%
25,001-30,000	6%
30,001-35,000	8%
35,001+	10%

- ii. The following percentage of the Adjusted Base based on the number of Ticketed Patrons in the Plaza Theatre (pro-rated first year of operation) as evidenced by ticket manifests, turnstile counts and/or drop counts:

<u>Ticketed Patrons</u>	<u>Percentage</u>
0-40,000	0%
40,001-60,000	2%
60,001-80,000	4%
80,001-100,000	6%
100,001-120,000	8%
120,001+	10%

- iii. The following percentage of the Adjusted Base if there are the following **Days of Activity** in the Children's Theatre during a fiscal year:

<u>Days</u>	<u>Percentage</u>
0-29	0%
30-59	2%
60-89	4%
90-119	6%
120-149	8%
150 +	10%

- iv. The following percentage of the Adjusted Base if there are the following **Special Consideration for Non-Profit Organization Days of Activity** that improve the quality of life:

<u>Days</u>	<u>Percentage</u>
0-25	0%
26-50	2%
51-75	4%
76-100	6%
101-125	8%
126 +	10%

- v. The City Manager will review the above performance measures with Manager two years after the opening of the Plaza Theatre and make recommendations to City Council.

- (g). The incentive fees determined pursuant to this Section 8.2 shall be payable to Manager within 30 days after the City's receipt of an invoice from Manager accompanied by the audited annual fiscal statements.
- (h). No later than ninety (90) days after the end of each Fiscal Year, Manager shall furnish to Operator an external auditor's report regarding the above performance measures. All costs incurred in complying with this audit

shall be Operating Expenses and Manager's obligation to provide such audited reports to Operator shall be contingent upon inclusion of funding in the budget for same.

5. Section 10.2 of the Management Agreement, entitled "**Termination for Convenience**" is hereby amended and restated to read as follows:

"Effective on and after September 1, 2010, Operator may terminate this Agreement, in whole or in part, at any time by ninety (90) days' prior written notice to Manager. Manager will be paid the costs and expenses incurred by Manager with respect to the Facility, including, Management Fees for work performed up to the effective date of termination. Manager will promptly submit any such payment and reimbursement claims to Operator for prompt payment. If either Party has any property in its possession belonging to the other Party, the party in possession shall account for same, and dispose of it in the manner the other party directs."

**IN WITNESS WHEREOF**, the undersigned have executed this Fourth Amendment to the Facility Management and Tourism Agreement dated March 12, 1998, as of this 20<sup>th</sup> day of July 2004.

**OPERATOR**  
**CITY OF EL PASO**

**ATTEST:**

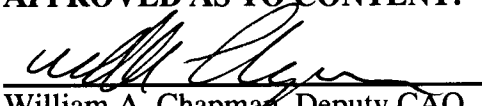
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Joe Wardy, Mayor

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**APPROVED AS TO FORM:**

  
Ruth Reyes  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

  
William A. Chapman, Deputy CAO  
of Financial Services

**MANAGER**  
**SMG**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_